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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/060,754	01/30/2002	Jeffry B. Skiba	2329-01OU	8210
43354	7590	11/28/2007		
MESCHKOW & GRESHAM, P.L.C. 5727 NORTH SEVENTH STREET, SUITE 409 PHOENIX, AZ 85014			EXAMINER ANDERSON, CATHARINE L	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/060,754	Applicant(s) SKIBA ET AL.	
	Examiner C. Lynne Anderson	Art Unit 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 September 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 21, 24, 28, 30 and 35-44 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 21, 24, 28, 30 and 35-44 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Arguments

Applicant's arguments filed 4 September 2007 have been fully considered but they are not persuasive.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to the applicant's argument that Kang cannot suggest providing a mask face having fog outlets centered thereon since Kang does not recognize the problem of inefficient delivery of the fog, it is noted that the modification of Kang in view of Fried is motivated not by Kang's disclosure of a deficiency in the mask, but rather by Fried's disclosure of a placement of the fog outlets that results in improved delivery of the medicament.

In response to the applicant's argument that one would not be motivated to modify Kang to include the rigid ear supports of Bertera, it is noted that use of either rigid ear supports or a flexible strap to secure a mask or goggles is well-known in the art. Many types of goggles, such as protective eyewear for laboratory use, is available

with either rigid ear supports or a flexible strap. Bertera teaches the use of rigid ear supports to reduce the bulkiness of the apparatus, since conduits for carrying medicament can be included in the rigid ear supports, and therefore provides motivation for modification of the mask of Kang.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21, 28, 30, 35, and 38-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kang (5,807,357) in view of Fried (5,836,927).

With respect to claims 21 and 30, Kang discloses all aspects of the claimed invention with the exception of the fog outlets being centered on the mask face. Kang discloses an apparatus for delivering medicine to tissues, as shown in figure 2, comprising a mask 10 to be worn around the eyes, the mask 10 comprising fog outlets (shown as holes in figure 3, but not numbered). An atomizer 20 atomizes medicine 90 into a fog, which passes through a conduit 11 and is discharged from the fog outlets.

Fried teaches a mask for administering a medication to the eyes of a user in which the outlets for the medication are centered on the mask face, as shown in figure 1. The placement of the outlets on the mask face allow for the medication to be administered accurately into the user's eyes, as disclosed in column 1, lines 55-60. It would therefore be obvious to one of ordinary skill in the art at the time of invention to

place the outlets of Kang on the mask face, as taught by Fried, to allow the medication to be administered accurately into the user's eyes.

With respect to claim 28, a power supply 40 is located in a separate chamber from, and therefore distal from, the atomizer unit, as shown in figure 2.

With respect to claim 30, Kang discloses a method of providing the mask described above and atomizing fluid into a fog, as disclosed in column 2, lines 27-36. The fog comprises an eye treatment solution, or medicine, as disclosed in column 1, lines 37-39.

With respect to claim 35, the conduit 11 is mounted at the fog outlets, as shown in figure 3.

With respect to claim 38, the atomizer 20 comprises a medication chamber 90, as shown in figure 3.

With respect to claims 39, the atomizer 20 is located away from the fog outlets by the distance of the conduit 11, as shown in figure 3.

Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kang (5,807,357) in view of Fried (5,836,927), and further in view of Dykstra et al. (5,935,982).

Kang, as modified by Fried, discloses all aspects of the claimed invention but remains silent as to the size of the liquid droplets of the fog. Dykstra discloses administering a medicine to the eyes, the medicine being in the form of liquid droplets having a size of less than 5 microns, as described in column 12, lines 13-15 and 36-37.

It would therefore be obvious to one of ordinary skill in the art at the time of invention to make the droplets of Kang less than 5 microns, since Kang teaches less than 5 microns as a suitable size for medicine being delivered to the eyes.

Claims 36-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kang (5,807,357) in view of Fried (5,836,927), and further in view of Bertera (5,368,582).

Kang, as modified by Fried, discloses all aspects of the claimed invention with the exception of the mask having rigid ear supports, the ear supports comprising a portion of the conduits. Bertera teaches a mask for administering a medication to the eyes of a user, the mask having rigid ear supports that comprise a portion of the conduits that carry the medication, as shown in figure 1. The rigid ear supports comprising the conduits of Bertera reduce the bulkiness of the apparatus, as disclosed in column 1, lines 54-63. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the apparatus of Kang with rigid ear supports, as taught by Bertera, to reduce the bulkiness of the apparatus.

Claim 40 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kang (5,807,357) in view of Fried (5,836,927), and further in view of Hewitt et al. (5,216,759).

Kang, as modified by Fried, discloses all aspects of the claimed invention with the exception of the conduits being flexible. Hewitt discloses goggles of a similar construction to the mask of Kang, and teaches constructing the mask using a flexible

material in order to allow the mask to conform to the wearer, as disclosed in column 3, lines 47-52. A mask that conforms to the face of the wearer provides a secure fit, which would ensure the fog discharged into the mask of Kang would not escape the mask, and therefore the mask of Kang would be more effective in delivering the fog to the eyes of the wearer. If the mask of Kang is constructed from a flexible material, the conduits, which comprise part of the mask, would also be flexible.

It would therefore be obvious to one of ordinary skill in the art at the time of invention to construct the mask of Kang out of a flexible material, as taught by Hewitt, to allow the mask to conform to the wearer and provide a secure fit.

Claims 41-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vo (5,171,306) in view of Fried (5,836,927).

Vo discloses all aspects of the claimed invention with the exception of an atomizer. Vo discloses an apparatus for delivering medicine to the eyes of a user, as shown in figure 1, comprising a mask 320 including a mask frame and rigid hollow ear support members. An atomizer 500 provides a medicine-carrying fog, as disclosed in column 5, lines 44-47. Elongated conduits 300 carry medicament to fog outlets 335, and a portion 325 of the conduits 300 are located in the hollow ear support members, as shown in figure 1. The hollow ear support members are located between the fog outlets 335 and the atomizer, as shown in figure 1. The mask face is substantially transparent.

Fried teaches a mask for administering a medication to the eyes of a user in which the outlets for the medication are centered on the mask face, as shown in figure

1. The placement of the outlets on the mask face allow for the medication to be administered accurately into the user's eyes, as disclosed in column 1, lines 55-60. It would therefore be obvious to one of ordinary skill in the art at the time of invention to place the outlets of Vo on the mask face, as taught by Fried, to allow the medication to be administered accurately into the user's eyes.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Lynne Anderson whose telephone number is (571) 272-4932. The examiner can normally be reached on Monday through Friday.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

CMA
cla
November 21, 2007

TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER

